93-732

NO. –

Supreme Court, U.S.
FILED
OCT 25 1993
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IN THE

In the Supreme Court of the United States

October Term, 1993

MICHAEL K. WHETSTONE,

Petitioner

versus

BETTY FOGLE WHETSTONE and JOSEPH KEELS,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

Eugene F. Rogers, Esquire
Sherrill and Rogers, PC
1441 Main Street, 10th Floor
Post Office Box 100200
Columbia, SC 29202-3200

ATTORNEY OF RECORD

QUESTIONS PRESENTED FOR REVIEW:

1. Whether the trial judge's sentence for criminal contempt and civil contempt in the Family Court action denied the Petitioner his right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution so as to constitute a substantial and grave miscarriage of justice and thus warrant the September 11, 1990, Order and the September 28, 1990, Nunc Pro Tunc Order of the trial court being vacated or reversed, and the action being remanded for a new trial, where neither the Rule to Show Cause for Contempt nor the supporting petition alleged criminal contempt nor sought criminal contempt; where the lower court ordered the Petitioner to be confined for a period in excess of that provided for in the sentence at trial and in excess of

that provided for by law without first providing the Petitioner all the guarantees of due process of law; where the lower court's order failed to provide that the Petitioner could purge himself of the civil contempt or alternatively where the order already accomplished that which the Petitioner was ordered to do so as to purge himself of civil contempt; where the remarriage of the parties had vitiated the court's prior restraining orders; and where at the close of the Plaintiff's case there was insufficient evidence that the Petitioner's conduct was in willful disregard of the court's restraining orders.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Michael K. Whetstone, respectfully requests that a Writ of Certiorari issue to review the July 28, 1993, decision of the Supreme Court of South Carolina.

OPINIONS BELOW

The unreported decision of the Supreme Court of South Carolina was handed down on July 28, 1993, and is reproduced herein as Appendix A. The unreported decision of the Court of Appeals of South Carolina was handed down on December 29, 1992, and is reproduced herein as Appendix B. The Order of the Court of Appeals of South Carolina denying the Petition for Rehearing was handed down on February 3, 1993, and is reproduced herein as Appendix C.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision of the Supreme Court of South Carolina was handed down on July 28, 1993. This Petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

2. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

3. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

4. The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life,

> liberty, or property, without due process of law . . . .

5. Article XI, Section 2 of the Constitution of the United States, Section 1, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner and Betty Whetstone were first married on June 28, 1946. As a result of certain marital difficulties, they separated in November of 1982, and thereafter commenced divorce proceedings. By Order of the Family Court, a Trustee was appointed to marshall assets, and by Consent Order dated October 7, 1983, the parties were mutually restrained and enjoined from conveying any assets marshalled by the Trustee. On February 27, 1984, the Consent Order was made permanent by Order of the Court, and the Trustee was made Receiver. By Order of the Court dated November 28, 1984, the Court approved the parties' agreement relating to the ultimate distribution of properties held by the Receiver. Thereafter, on May 8, 1985, the parties were divorced.

Approximately one year later on April 10, 1986, and prior to distribution by the Receiver of the properties affected by the November 28, 1984 Order, the parties remarried. The remarriage was unsuccessful, however, and the parties again separated in November of 1986.

Almost three years after their second separation, the Court on December 20, 1989, ordered the Receiver to prepare a plan for conclusion of the Receivership. Prior to the issuance of this Order, and after the remarriage of the parties, the Petitioner had conveyed certain pieces of real property affected by the February 27, 1984 permanent Consent Order.

On April 16, 1990, the plan submitted by the Receiver was approved by the Court. Upon examining the title to the properties that were to be distributed pursuant to this plan, the Receiver discovered the

conveyances the Petitioner had made after the remarriage of the parties. As a result, on May 29, 1990, the Respondents caused to be issued upon the Petitioner an Order and Rule to Show Cause for contempt. The order and supporting petition are reproduced herein as Appendix D. The matter was heard on September 11, 1990, before the Honorable William M. Campbell, Family Court Judge for the Fifth Judicial Circuit for the State of South Carolina, at which time Petitioner was committed to the Richland County Detention Center for a period of twelve months. The September 11, 1990, Order of the Family Court of the Fifth Judicial Circuit of the State of South Carolina is reproduced herein as Appendix E.

Petitioner appealed the September 11, 1990, Order of the Family Court to the Supreme Court of South Carolina on the

grounds that his right to due process of law had been denied inasmuch as nothing prior to sentencing had apprised the Petitioner that he was on trial for criminal contempt. The appeal vested in the Supreme Court of South Carolina exclusive jurisdiction over all issues. After the appeal was taken, the trial judge filed the Nunc Pro Tunc Order of September 28, 1993, which is reproduced herein as Appendix F.

The Supreme Court of South Carolina transferred the appeal to the South Carolina Court of Appeals which affirmed the trial judge's order by unpublished opinion dated December 29, 1992, reproduced herein as Appendix B. Petitioner timely petitioned for a rehearing which was denied by Order of the South Carolina Court of Appeals dated February 3, 1993, reproduced herein as

Appendix C. Petitioner timely filed a Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina. By unreported decision dated July 28, 1993, the Supreme Court of South Carolina denied the Petition for Certiorari. The July 28, 1993, Order is reproduced herein as Appendix A.

Petitioner's claim that he was denied due process of law has been finally decided by the highest state court in which review may be had and no further review of this federal issue in the state courts is possible. Thus a final judgment or decree exists.

The questions presented for review herein have been timely raised as well as explicitly presented to and passed upon by the Supreme Court of South Carolina. That court has issued a final decision regarding the federal question of whether

Petitioner was denied due process of law by reason of the lack of notice of the pendency of a criminal contempt proceeding against Petitioner prior to sentencing, and has declined further review of the order of the South Carolina Court of Appeals.

REASONS FOR GRANTING PETITION

The sentencing of Petitioner to twelve (12) months in jail without notice prior to sentencing that he was on trial for criminal contempt, without according him the opportunity to demand a jury trial, without according him the opportunity to refuse to give testimony against himself, without providing a meaningful way in which Petitioner could purge himself of the contempt, and where there was no evidence of willful disregard of court orders that pre-dated his remarriage to Respondent, denied

Petitioner his right to due process of law under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution so as to constitute a substantial and grave miscarriage of justice and thus warrant the September 11, 1990, order and September 28, 1990, Nunc Pro Tunc Order being vacated and reversed and the action being remanded for a new trial.

Due process must be afforded when a state seeks to deprive an individual of a protected liberty interest. Ingraham v. Wright, 430 U.S. 651 (1977). Prosecutions for serious criminal contempt entitles the defendant to due process guarantees. Bloom v. Illinois, 391 U.S. 194 (1968). The right of persons accused of serious offenses to know, before trial, the specific nature and detail of the crimes they are charged with committing is

extended to those persons charged with criminal contempt. Aaron v. State, 248 So. 2d 673 (1973). An order to show cause why a defendant should not be held in contempt is insufficient if it does not state the essential facts constituting the criminal offense charged. Deter v. Deter, 353 So. 2d 614 (Fla. App. 1977).

Criminal intent is a necessary element to a criminal contempt conviction. U.S. v. Warlick, 742 F.2d 113 (1984); State v. Scott, 269 S.C. 542, 238 S.E. 2d 217 (1977). Although the notice need not include the words "criminal contempt," it is insufficient unless the defendant is clearly apprised that the proceeding is for criminal rather than civil contempt. Hopkins v. Jarvis, 648 F.2d 981 (5th Cir. 1981). Where the petition and affidavit charge that Defendant has acted in willful, intentional, and contemptuous

disregard of the Court's Order, the contemnor has received sufficient notice that criminal contempt is charged even though the Rule to Show Cause does not use the word "criminal." Stewart v. Dunn, 363 F.2d 591 (5th Cir. 1966). Nevertheless, for the notice of criminal contempt to be valid, it must indicate the criminal nature of the proceeding. Re Remaker, 646 F.2d 870 (5th Cir. 1980). If there is doubt as to the nature of the proceeding, the matter should be treated as a civil contempt rather than a crime. U.S. v. Montgomery, 155 F.Supp. 633 (D.C. Mon., 1957); Clark v. Boynton, 362 F. 2d 992 (5th Cir., 1966); Brown v. Baddick, 595 F.2d 961 (5th Cir., 1979).

Despite the neatly defined categories of contempt, both types of contempt may be involved at once, but any doubt as to the category into which the contemptuous act

falls should be resolved in favor of the contemnor. Deter v. Deter, 353 So.2d 614 (Fla. App., 1977). Where an order of contempt discloses the existence of elements of both criminal and civil contempt, the defendant must be afforded the full protection required in a criminal contempt proceeding, and non-compliance constitutes a fundamental error not waived by failure to raise the issue at trial. Deter v. Deter 353 So.2d 614 (Fla.App., 1977).

In the instant case, there was nothing in the Petition or Rule to Show Cause that would lead Petitioner to suspect he was being prosecuted for criminal contempt. The Petition does not even allege that Petitioner was restrained from doing the activity complained of, much less that he willfully, intentionally, or contemptuously violated

the Order. In fact, none of these words appears anywhere in the Receiver's Petition or in the Rule to Show Cause. Nor does the Receiver ask the Court to "punish" the Petitioner. Indeed, all of the language employed in the Petition and all of the relief being sought would suggest that the Receiver wanted remedial relief rather than punitive powers from the Court. Where only civil contempt is sought, it is erroneous for the trial judge to treat the matter as one for criminal contempt. State v. ex. rel. Love, 285 S.C. 53, 328 S.E.2d 77 (1985).

It was only at trial that Petitioner learned that he was accused of violating a six-year old Restraining Order that pre-dated the remarriage of the parties. He did not learn until sentencing that he had been on trial for criminal contempt as well as civil contempt. In fact, this

case is attended by the same confusion that caused the court in Clark v. Boynton, 362 F.2d 992, 994 (5th Cir., 1966) to declare: "The simple fact is that no one, simply no one is able to determine whether this was begun, tried, or ended as a case for criminal contempt, civil contempt, or both, or whether some place down the trail, begun as one, it was transmuted into the other. This is, of course, one thing about which there may not be any doubt if a contempt order is to stand."

Prior to sentencing, the Petitioner had no reason to believe he was on trial for criminal contempt. The opinion of the Court of Appeals of South Carolina avoids this issue by holding that Petitioner did not raise the adequacy of notice at trial, and therefore it could not be considered for the first time on appeal. However, one cannot preserve for the record on

appeal issues which one does not realize are being tried. Knowing that he was being prosecuted for a crime would likely have caused Petitioner to demand a jury trial and would certainly have influenced his decision to testify and be subjected to cross-examination. The latter decision is particularly important in this case since the Receiver in his Case in Chief had produced no evidence that could have sustained a criminal conviction of the Petitioner.

At the close of the case, the trial judge sentenced Petitioner from the bench to one hundred seventy-five (175) days in jail for criminal contempt and to twelve (12) months in jail for civil contempt and provided that Petitioner could purge himself of the civil contempt by restoring the conveyed properties to their original posture. Petitioner was taken into

immediate custody for both the criminal and civil contempt. That same day, September 11, 1990, the court issued its sentencing order committing the Petitioner to jail "for a period of twelve months."

This Order was contrary to the oral sentencing order in two critical aspects: (1) it failed to provide Petitioner with the opportunity to purge himself of contempt , and (2) it failed to distinguish between the sentence for criminal contempt and civil contempt. These omissions are critically important, where, as here, Petitioner had been taken into immediate custody. Contempt is deemed "criminal" when the Defendant is not given the opportunity in the Sentencing Order for immediate release to purge himself of the act. Hendershot v. Hendershot, 263 S.E.2d 90 (W.Va., 1980).

Because the Court's Order failed to provide that Petitioner could obtain his immediate release by purging himself of the contempt, Petitioner is deemed to have been sentenced to twelve months in prison for criminal contempt, a sentence that was contrary to the oral sentence of one hundred seventy-five (175) days for criminal contempt. An Order that does not conform to the sentence issued at trial is fatally defective. McCranie v. Davis, 278 S.C. 513, 299 S.E.2d 338 (1983); Martin v. Ross, 286 S.C. 43, 331 S.E.2d 785 (1985).

It should not matter that the September 11th Order provided that "A detailed order shall follow." Petitioner was taken into immediate custody, an act that rendered the Order final. The same day, he was confronted with a written Order confining him to twelve (12) months in prison and providing no opportunity to

purge himself of contempt. That a detailed Order clarifying the dual nature of the confinement might eventually follow is of little comfort to one already serving a fixed sentence of more than twice the one hundred (175) days pronounced at trial. The ten (10) days to appeal had commenced, and Petitioner was required to timely appeal so as to protect his rights.

It is of course the fixed term of confinement together with the lack of opportunity to purge oneself of the contempt that separates criminal contempt from civil contempt. Shillitani v. U.S., 384 U.S. 364 (1966); Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 115 (1982). If the contempt is "criminal" in nature, the Defendant's due process rights are implicated. Bloom v. Illinois, 391 U.S. 194 (1968). Any state criminal

prosecution involving sentences in excess of six (6) months confinement requires that due process rights must be accorded. Codisspoti v. Pennsylvania, 418 U.S. 506 (1974). Here, a fixed term of one year was ordered without any opportunity for Petitioner to purge himself of contempt and with only the cold comfort that a detailed order might eventually follow.

Seventeen (17) days after Petitioner was ordered confined to jail, the trial judge issued a Nunc Pro Tunc Order stating that the "hallmark of criminal contempt is evidence of willful disobedience of an order of the court." However, willful disobedience of an order of the court is an element of both civil and criminal contempt. The additional element which is the "hallmark" of criminal contempt is a "criminal intent." U.S. v. Warlick, 742

F.2d 113 (1984); State v. Scott, 269 S.C. 542, 238 S.E.2d 217 (1977).

At the hearing there was no evidence presented of the Petitioner's criminal intent. In fact, the Receiver's entire Case in Chief consisted of his own testimony and the introduction of certain deeds and contracts that were all executed after the remarriage of the parties and before the Court's Order of December 20, 1989, directing the Receiver to prepare a plan of distribution. The plan proposed by the Receiver was not approved by the Court until April 13, 1990. There was no question that all of the offending transfers were executed prior to the Court's approval of the plan and after the remarriage of the parties. However, some of the documents relating to the transfers were recorded in February of 1990, between the time of the Order directing the

Receiver to prepare a plan and the time of the Order approving the plan.

When the Receiver was examined about the filing and recording of these documents, he admitted that he did not know who had filed them. The Receiver also admitted that although the filing of the deeds would require the purchase of documentary stamps, he had made no inquiry as to who had purchased these stamps, nor had he made any inquiry as to who had actually filed the deed. As a result, there was no evidence presented that the Petitioner knew about or participated in the recording of the deeds, which was the primary complaint of the Respondent. In fact, it was admitted that no one knew who had recorded the offending documents. The Receiver's admission that he had no knowledge of who recorded the offending documents should have been dispositive of

the contempt issue because the Receiver admitted that it was the recordation of the documents which formed the "clouds on title" complained of in the Petition for a Rule to Show Cause.

At best, the Receiver's testimony amounted to a mere suspicion that Petitioner may have somehow been involved in the placing of clouds on these titles. Nevertheless, Petitioner's Motion for Directed Verdict was denied. In a criminal case, a trial judge should grant a directed verdict motion when the evidence merely raises suspicion that the accused is guilty. State v. Schrock, 283 S.C. 129, 332 S.E.2d 450 (1984). In order to support a finding of criminal contempt, the evidence must establish beyond a reasonable doubt that all the elements of civil contempt were present as well as the additional element of criminal intent on

the part of the Petitioner. Contempt results from willful disobedience of an Order of the Court, and before a person may be held in contempt, the records must be clear and specific as to the acts or conduct upon which such finding is based. State v. Harper, 297 S.C. 257, 376 S.E.2d (1989). A finding of contempt is subject to reversal where is it based on a finding that is without evidentiary support or where there has been an abuse of discretion. Pratt v. South Carolina Dept. of Soc. Serv., 283 S.C. 550, 324 S.E.2d 97 (1984); Hicks v. Hicks, 280 S.C. 378, 312 S.E. 2d 598 (Ct.App., 1984).

In the instant case, not only did the pleadings fail to allege that Petitioner acted in willful disregard of a Court Order, but the evidence adduced at trial also failed to support such a finding. The Order holding the Defendant in

contempt failed to apply the correct test as to the elements of criminal contempt by omitting the element of criminal intent. On this basis, Petitioner's directed verdict motion as to the criminal contempt charge should have been granted and it was error for the trial court to fail to do so.

The above conclusion is especially true when one considers that a judgment of contempt should be imposed sparingly and with due regard to the defendant's constitutional rights. Jackson v. Jackson, 241 S.C. 1, 126 S.E.2d 855 (1962); Fagan v. Timmons, 224 S.C. 286, 78 S.E.2d 628 (1954). In the instant case, not only was there a lack of due regard for Petitioner's constitutional rights, there was simply no evidence from which the Court could conclude that Petitioner

had "willfully" disobeyed an Order of the Court, much less that he had disobeyed one "beyond a reasonable doubt" and with "criminal intent."

Finally, that portion of the lower court's order relating to civil contempt should be reversed for failing to provide Defendant with the opportunity to purge himself immediately of the contempt. Petitioner was taken into immediate custody for both the civil and criminal contempt. The oral Order sentenced Petitioner to confinement for a period of 12 months for civil contempt, but provided that Petitioner could purge himself of this contempt by restoring the deeds to their former status. However, the written Order of that same date made no provisions for Petitioner to purge himself of contempt. As a result, Petitioner found himself confined to jail for a period of

12 months under circumstances where the keys to the jail were most decidedly not in his own pocket.

When the "detailed order" was finally issued 17 days later (after the Petitioner had appealed), Petitioner was still unable to purge himself of civil contempt because the Court ordered him to do something that the Court itself had already accomplished. The Order of September 28, 1990, provided that Petitioner could purge himself of the one year sentence for civil contempt "through effecting the removal of all clouds of title which inhibit the Receiver from selling, conveying, or otherwise disposing of the aforementioned properties." In the next paragraph, the Court declared that all of the transactions that resulted in the alleged clouds of title "are all null and void and shall have no affect on their title."

Accordingly, that which must be done had already been done, and Petitioner was without the ability to comply. Where the justification for coercive imprisonment no longer exists, a defendant cannot be held in contempt. Shillitani v. U.S., 384 U.S. 364 (1966).

CONCLUSION

When the foregoing errors of the Family Court are considered, it is apparent that Petitioner's due process rights were violated, resulting is a substantial and grave miscarriage of justice, and thus warrants the September 11, 1990, Order and September 28, 1990, Nunc Pro Tunc Order being vacated or reversed and the action being remanded for a new trial.

APPENDIX

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APPENDIX A

THE SUPREME COURT OF SOUTH CAROLINA

July 28, 1993

Clifford O. Koon, Jr., Esquire
P.O. Box 100200
Columbia, S. C. 29202-3200

RE: Whetstone, et al. v. Whetstone

Dear Mr. Koon:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/David W. Harwell C.J.
For the Court

Associate Justices Ernest A. Finney, Jr. and Jean H. Toal, not participating

July 28, 1993."

By copy of this letter we are asking counsel of record what disposition they would have us make of the extra copy of the record in this action. If we have not

heard from them to the contrary, we will destroy the record on August 9, 1993.

Very truly yours,

Clyde M. Davis, Jr.

~~DEPUTY~~ CLERK

BFS/dmh

cc: James R. Barber, III, Esquire
Kermit S. King, Esquire
The Honorable Barbara Scott
The Honorable Reba D. Mims
West Publishing Company

APPENDIX B

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Betty Fogle Whetstone and Joseph Keels, ...Respondents,

v.

Michael K. Whetstone, ...Appellant.

Appeal from Richland County
William M. Campbell, Family Court Judge

Unpublished Opinion No. 92-UP-181
Heard November 10, 1992
Filed December 29, 1992

AFFIRMED

Clifford O. Koon, Jr., of Columbia, for appellant.

Kermit S. King, of Columbia, attorney for respondent Betty Fogle Whetstone; James R. Barber, III, and J. Derrick Jackson, both of Todd and Barber, of Columbia, attorneys for respondent Joseph Keels.

PER CURIAM: Michael K. Whetstone was found in contempt of court for

disobeying various court orders relating to the distribution of material assets under a divorce decree that incorporated a property settlement of the parties. The court sentenced him to 175 days imprisonment for criminal contempt and one year for civil contempt. Whetstone appeals both sentences. We affirm

1. Whetstone first argues the petition and rule to show cause why he was not in contempt did not adequately notify him which orders he was alleged to have violated and that he faced a possible sentence for criminal contempt. Because he did not raise this issue at the contempt hearing and the family court did not rule on it, it is not preserved for appeal. *See State v. Gee*, 262 S.C. 373, 204 S.E.2d 727 (1974); *State v. Newton*, 274 S.C. 287, 262 S.E.2d 906 (1980). This

court sits to correct errors made by the trial court.

2. Whetstone also argues his actions were not in contempt, because his remarriage vitiated all court orders issued pursuant to his divorce. Again, he did not raise this issue at the contempt hearing nor did the family court rule on it. Therefore, there is no ruling of the family court for us to review.

3. Whetstone next argues there is insufficient evidence to prove he wilfully violated court orders. A finding of contempt rests within the sound discretion of the court, and its decision will not be reversed absent plain abuse of discretion. *Jackson v. Jackson*, 241 S.C. 1, 126 S.E.2d 855 (1962). The evidence tends to prove Whetstone wilfully disobeyed court orders requiring him to cooperate with the Receiver in distributing the marital

estate. The Receiver testified he did not give Whetstone permission to convey any property in the marital estate; yet, Whetstone admitted, among other things, he sold property allocated to Mrs. Whetstone. The court did not abuse its discretion in finding Whetstone's conduct was a wilful violation of court orders directing distribution of the marital estate.

4. Whetstone argues the judge erred by not indicating in its September 11, 1990, contempt citation how he could purge his civil contempt. The original order did not specify how Whetstone could purge his civil contempt. However, the judge indicated in that order that a more detailed order would follow. The judge issued the second order on September 28, 1990, seventeen days later. In it he stated how Whetstone could purge himself of contempt. Because Whetstone was

serving a concurrent 175 day sentence for criminal contempt, we hold he was not prejudiced by not being able to purge his civil contempt for the first seventeen days of his sentence.

5. Whetstone next argues the judge did not have jurisdiction to supplement the September 11th order on September 28th, because he appealed his sentence before the judge issued the second order. This argument is without merit. The judge expressly reserved jurisdiction in the first order to issue a more detailed supplemental order. Therefore, the first order was not final and the court maintained jurisdiction to issue the second order. Whetstone's appeal was premature. *See* Rule 203(b)(1), SCACR.

6. Whetstone finally argues the purging instructions in the judge's September 28,

1990, order were unclear and redundant. The instructions state:

> Mr. Whetstone may purge himself of civil contempt by processing and recording the necessary documents to restore the state of the titles of the above-mentioned property to the status prior to the execution and delivery and recording of the documents above-mentioned.

Whetstone contends this order does not sufficiently explain which actions he must undertake to purge his civil contempt sentence. However, he testified he had already taken steps to vacate all the recordings and transfers for which he was later found to be in contempt. He submitted to the court copies of documents which he claimed would remove the clouds on the titles to the property in question. The following is an exchange between Whetstone and his attorney:

> Q: And when these documents are filed, the original documents are filed, then they will put back the property, put

> back the condition and title to this property as they were prior to these documents being filed, is that correct?
>
> A: I believe so, yes.

The judge's instructions ordered Whetstone to do what he testified he could do. Whetstone's own testimony shows he understood what he was required to do. He argument that the judge's instructions were unclear is without merit.

Moreover, the judge's statement of how Whetstone could purge his contempt was not "redundant," as Whetstone asserts. Although the judge had issued a decree declaring void the transactions and recordings by which Whetstone clouded the titles to the properties in question, the judge did not abuse his discretion in requiring Whetstone to cancel on the record the unlawful transactions by which he attempted to make the properties unmarketable. Such action by Whetstone

would help clarify to title searchers that the persons or entities who were illegally granted interests in the properties claimed no rights in them. The judge committed no error by ordering Whetstone to restore the titles to their original condition. *See Alpine Palm Springs Sales, Inc. v. Superior Court for Los Angeles*, 274 Cal. App. 2d 523, 79 Cal. Rptr. 415 (1969).

AFFIRMED. s/ Curtis H. Shaw , J.

s/ Randall T. Bell , J.

s/ Jasper M. Cureton , J.

APPENDIX C

THE STATE OF SOUTH CAROLINA

Betty Fogle Whetstone and Joseph Keels, ...Respondents,

v.

Michael K. Whetstone, ...Appellant.

ORDER

After careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no ground for a rehearing. It is therefore ordered that the Petition for Rehearing be denied

s/ Curtis H. Shaw , J.

s/ Randall T. Bell , J.

s/ Jasper M. Cureton , J.

Columbia, South Carolina

February 3, 1993

APPENDIX D

STATE OF SOUTH CAROLINA) In the Family Court for
) The 5th Judicial Circuit
COUNTY OF RICHLAND) Case No. 83-DR-40-4150

BETTY FOGLE WHETSTONE,

Petitioner,

v.

MICHAEL K. WHETSTONE,

Respondent.

ORDER AND RULE SHOW CAUSE

THIS MATTER is before me upon the Petition of the Court Appointed Receiver in this matter wherein the Receiver seeks to hold the Respondent in contempt for attempting to convey certain real property and to cloud title to real property in direct violation of the Orders of this Court. Having read the Petition, and it appearing that there are adequate grounds for the relief sought, it is

ORDERED that the Respondent, Michael K. Whetstone, appear before this Court at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina

29201, on the 4th day of June, 1990, at 9:00 a.m. to show cause, if any you can, why you should not be held in contempt.

s/ Wm. M. Campbell
WILLIAM M. CAMPBELL, JR.
Family Court Judge
Fifth Judicial Circuit

Columbia, South Carolina
May 29, 1990.

STATE OF SOUTH CAROLINA	)	In the Family Court for
	)	The 5th Judicial Circuit
COUNTY OF RICHLAND	)	Case No. 83-DR-40-4150
BETTY FOGLE WHETSTONE,	)	
	)	
Petitioner,	)	
	)	PETITION
v.	)	
	)	
MICHAEL K. WHETSTONE,	)	
	)	
Respondent.	)	
	)	

Joseph Keels, Jr., would respectfully show unto the Court:

1. That he was appointed as Receiver for all of the properties of Michael K. Whetstone, Betty F. Whetstone, Commodity Engineering Company, a corporation, Tristeel Corporation, and Division V Company; and as such, was required to marshall all of the assets of the respective parties.

2. That pursuant to the Order of the Family Court for the Fifth Judicial Circuit, dated November 28, 1984, the Receiver was required to sell certain property, more particularly known as 900

Whaley Street, in the City of Columbia, County of Richland, State of South Carolina.

3. That pursuant to the Order of the Court of November 28, 1984, the Order of the court dated December 20, 1989, and the Order of the Court dated April 13, 1990, the Receiver was required to make distribution of certain real property to either Michael K. Whetstone or Betty F. Whetstone so as to conclude the Receivership.

4. That so as to carry out the orders of the Court, the Receiver caused an examination of the public records of Richland and Lexington Counties to secure descriptions of the properties to prepare deeds to convey the aforementioned lands. Upon examination of said records, the Receiver learned that clouds have been placed on the titles of certain properties

to wit: 900 Whaley Street, titled in the name of Michael K. Whetstone, d/b/a Commodity Engineering Company, was conveyed to Vegakool Machinery Company by deed dated February 10, 1989, and recorded in the Office of the RMC for Richland County on May 4, 1990; the 3.96 acres located on Highway 60, near Irmo, South Carolina, titled in the name of Michael K. Whetstone which, pursuant to said previous Order is to be conveyed to Betty F. Whetstone, but whereas by deed dated January 2, 1989, and recorded in the Office of the RMC for Lexington County on February 23, 1990, was conveyed to Michael Whetstone Associates, Inc.; and the property located at 1114 Bryan Street, Columbia, South Carolina, which is titled in the name of Commodity Engineering Company, a corporation, said title being clouded by a contract of sale dated

January 22, 1987, said contact being by and between Michael K. Whetstone and Vegakool Machinery Company, and being recorded in the Office of the RMC for Richland County on February 12, 1990.

5. That all of the recorded documents referred to in paragraph 4 constitute a cloud on the respective titles of said properties which may have an adverse affect on the ultimate disposition of said properties.

6. That, upon information and belief, Michael K. Whetstone did either participate directly in the clouding of said titles or had information or knowledge of the potential clouds on the titles and failed to advise either the court or the Receiver, all of which actions are directly contrary to the previous Orders of this Court.

7. That, upon information and belief, the actions of Michael K. Whetstone constitute contempt of this court and Michael K. Whetstone should be so held in contempt and appropriate action taken by this Court.

NOW, THEREFORE, the Receiver prays that this Court issue its Rule to Show Cause requiring Michael K. Whetstone to appear before this Court to show cause why he should not be held in contempt of this court for actions which are contrary to previous Orders of this Court and which affect the ability of the Receiver to carry out his required duties.

TODD & BARBER, PC

s/ J.R. Barber

James R. Barber, III
Attorney for Receiver
Post Office Box 1549
2001 Park Street
Columbia, South Carolina 29202
(803) 779-4383

Columbia, South Carolina
May 23, 1990

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF RICHLAND)

PERSONALLY appeared before me Joseph Keels, Jr. who, being first duly sworn, states as follows: that he is the Receiver in the foregoing action; that he has read the foregoing PETITION; that the statements contained therein are true to the best of his knowledge save and except as to those stated to based upon information and belief, as to which, he believes such matters to be true.

s/ Joseph Keels, Jr.
Joseph Keels, Jr.

SWORN and subscribed to before
me this 23rd, day of May, 1990

s/ Constance Hope Altman (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: 12/12/98.

(SEAL)

APPENDIX E

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE FAMILY COURT FOR THE
FIFTH JUDICIAL CIRCUIT

Betty Fogle Whetstone,	)	
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
Michael K. Whetstone,	)	90-DR-40-4150
	)	
Defendant.	)	

This matter came before the Court on September 11, 1990. The Defendant, Michael K. Whetstone, is hereby committed to the Richland County Detention Center for a period of twelve months. A detailed order shall follow.

AND IT IS SO ORDERED.

s/ Wm. M. Campbell
William M. Campbell, Presiding
Judge, Fifth Judicial Circuit

September 11, 1990
Columbia, South Carolina

APPENDIX F

STATE OF SOUTH CAROLINA)	In the Family Court for
)	The 5th Judicial Circuit
COUNTY OF RICHLAND)	Case No. 83-DR-40-4150

BETTY FOGLE WHETSTONE,

Petitioner,

v.

MICHAEL K. WHETSTONE,

Respondent.

ORDER

THIS MATTER came before me for a hearing upon a Petition and Rule to Show Cause issued by this Court on May 29, 1990 to the Respondent, Michael K. Whetstone (as to why Mr. Whetstone should not be held in contempt for attempting to convey and encumber certain real property, clouding titles to that property, in direct violation of the Orders of this Court) and upon a Notice of Motion and Motion to have the Court declare all of the conveyances and encumbrances on these properties null and void.

The hearing was originally scheduled for June 4, 1990, but was continued by this Court to September 11, 1990. Present at the hearing were the Receiver, Joseph Keels, Jr., along with the Receiver's counsel, James R. Barber, III. Also present were the Respondent, Michael K. Whetstone, and his attorney, Richard A. Harpootlian, and counsel for the Petitioner, Kermit S. King.

Based upon the record and all the evidence and testimony received by the Court at the hearing (with the Court having carefully considered all of the documentary evidence and having carefully observed the demeanor of the witnesses) this Court finds beyond a reasonable doubt that Respondent, Michael K. Whetstone, has willfully conveyed or encumbered properties that have been marshalled by the Receiver pursuant to previous Orders

of this Court, which he specifically has been restrained from doing by said Orders of this Court dated October 7, 1983 and February 27, 1984, and is guilty of both criminal and civil contempt as is more fully set forth below.

FINDINGS OF FACT

1. That by Consent Order dated October 7, 1983, Mr. Whetstone was restrained and enjoined from conveying, hypothecating or otherwise interfering with assets marshalled by the Trustee. (pg. 26)

2. That this Restraining Order was made permanent by Order of this Court dated February 27, 1984, at which time the Trustee was replaced by the Receiver. (pg. 16)

3. That the Order dated November 28, 1984, approved an agreement of the parties regarding the ultimate

distribution of properties held by the Receiver, of which 900 Whaley Street was to be sold, 601 Catawba Street was to be conveyed to Mr. Whetstone and a 3.96 acre tract near Irmo, South Carolina, was to be conveyed to Mrs. Whetstone.

4. That following a lengthy hearing in late 1988, this Court issued an Order of December 20, 1989, requiring the Receiver to prepare a plan for the ultimate conclusion of the Receivership.

5. That the Receiver did submits his plan, which was approved by this Court in an Order filed April 16, 1990.

6. That, in carrying out the Orders of the Court, the Receiver caused to be made an examination of the public records of Richland County, to secure descriptions of the properties so as to prepare deeds to convey the aforesaid lands.

7. That upon examination of said records, it was determined that conveyances or encumbrances have been placed on record as to certain properties as follows:

(a) 900 Whaley Street, titled in the name of Michael K. Whetstone, d/b/a Commodity Engineering Company, was conveyed to Vegakool Machinery Company by deed dated February 10, 1989, and recorded in the Office of the RMC for Richland County on May 4, 1990;

(b) 3.96 acres, located on Highway 60, near Irmo, South Carolina, titled in the name of Michael K. Whetstone (which, pursuant to Court Order is to be conveyed to Betty F. Whetstone) but whereas the deed dated January 2, 1989, and recorded in the Office of the RMC for Lexington County on February 23, 1990, was conveyed to Michael Whetstone Associates, Inc.;

(c) 601 Catawba Street, Columbia, South Carolina which is titled in the name of Commodity Engineering Company, a corporation, is the subject of a contract of sale dated January 22, 1987, said contract being by and between Michael K. Whetstone and Vegakool Machinery Company, being recorded in the Office of the RMC for Richland County on February 12, 1990 (this property, pursuant to the Order of the Court of November 28, 1984, was to be conveyed to Mr. Whetstone, but under the Receiver's plan of April 16, 1990, is to go to Mrs. Whetstone).

8. That no authorization was ever given to Michael Whetstone by this Court or the Receiver to either contract or to convey as to any of the aforementioned properties.

9. That all of the recorded documents are a cloud on the respective

titles of the properties and interfere with the orderly administration of the Receivership in direct violation of previous Orders.

10. That Michael K. Whetstone willfully participated in the clouding of these titles and had information or knowledge of these potential clouds on the titles and failed to advise either the Court or the Receiver, all of which actions are directly contrary to the previous Orders of this Court, dated October 7, 1983, February 27, 1984 and November 28, 1984.

CONCLUSIONS OF LAW

The hallmark of criminal contempt in evidence of willful disobedience of an order of the court. Checker Cab Co. v. Checker Cab & Parcel Serv., 287 S.C. 605, 340 S.E.2d 549 (Ct. App. 1986) In criminal contempt, the guilt of the

contemnor must be beyond a reasonable doubt. In this case, the Court is convinced beyond a reasonable doubt that Michael K. Whetstone continually and willfully violated Order after Order after Order of this Court.

Mr. Whetstone's blatant disregard for this Court's authority concerns the 3.96 acres located on Highway 60, near Irmo, South Carolina, which by Court Order was to be conveyed to Mrs. Whetstone. Mr. Whetstone conveyed this property, along with another piece of Irmo property, to Michael Whetstone Associates, Inc. When questioned on cross-examination as to why he conveyed this property, Mr. Whetstone explained he could not determine which property was his so he conveyed them both. Mr. Whetstone did this despite full knowledge that, by agreement between Mr. Whetstone and his wife, the 3.96 acres is

Mrs. Whetstone's, said agreement having been approved by this Court.

Mr. Whetstone further exhibited his blatant disregard for the Orders of this Court by his actions with respect to 900 Whaley Street. This property was to be sold by the Receiver by the agreement of the parties approved November 28, 1984, Order. Mr. Whetstone agreed to the disposition of the property by sale. Yet Mr. Whetstone executed a contract of sale on January 22, 1988, for the sale of 900 Whaley Street and then signed a deed conveying the property Vegakool Machinery Company.

The purpose of civil contempt is to compel obedience to the Court's Orders. Clamp v. Hall, 287 S.C. 270, 335 S.E.2d 815 (Ct. App. 1985) A person held in civil contempt, unlike criminal contempt, may purge the contempt by complying with

the court's Order. Id. In this case, Mr. Whetstone failed to obey the Orders of this Court and interfered with the orderly administration of the Receivership by execution and delivery of the documents above-mentioned.

Mr. Whetstone may purge himself of civil contempt by processing and recording the necessary documents to restore the state of the titles of the above-mentioned property to the status prior to the execution and delivery and recording of the documents above-mentioned.

Michael Whetstone certainly had no authority to convey or encumber the properties at 900 Whaley Street, 601 Catawba Street or the 3.96 acres near Irmo, South Carolina. Therefore, the conveyances and encumbrances which cloud their titles should be declared null and void.

NOW, THEREFORE, BY REASON OF THE FOREGOING:

IT IS ORDERED, ADJUDGED AND DECREED that Michael K. Whetstone be, and hereby is, found guilty of criminal contempt and is sentenced to serve one hundred seventy five (175) days in the Richland County Jail, as to which an appropriate commitment order shall be issued. While interred, Mr. Whetstone is prohibited from participating in any program authorized under Section 24-13-210, Section 24-13-230, and Section 24-13-910 of the South Carolina Code of Laws.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Michael K. Whetstone be, and hereby is, held in civil contempt and is sentenced to serve one (1) year in the Richland County Jail. This civil contempt may be purged by Mr. Whetstone through effecting the removal of all clouds of

title which inhibit the Receiver from selling, conveying, or otherwise disposing of the aforementioned properties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the conveyance of 900 Whaley Street to Vegakool Machinery Company, the conveyance of 3.96 acres located near Irmo, South Carolina from Michael K. Whetstone to Michael Whetstone Associates, Inc., and the contract of sale between Michael K. Whetstone and Vegakool Machinery Company for 601 Catawba Street are null and void and shall have no affect on their title.

s/ Wm. M. Campbell
WILLIAM M. CAMPBELL, JR.
Family Court Judge
Fifth Judicial Circuit

Nunc Pro Tunc
September 11,
1990

Columbia, South Carolina
September 28, 1990.

APPENDIX G

(Filed with brief to South Carolina Supreme Court on February 19, 1991, and subsequently transferred to South Carolina Court of Appeals)

ASSIGNMENTS OF ERROR

1. The Court erred in finding Defendant guilty of criminal contempt when the Receiver's Petition sought only civil contempt.

2. The Court violated the Defendant's due process rights by failing to properly notify Defendant in the Rule to Show Cause that Defendant was being charged with criminal contempt.

3. The Court violated the Defendant's due process rights by failing to provide Defendant with the opportunity to demand a jury trial as guaranteed by the United States

Constitution and the Constitution for the State of South Carolina.

4. The Court violated the Defendant's due process rights by failing to provide Defendant with the opportunity to refuse to give testimony against himself as guaranteed by the United States Constitution and the Constitution for the State of South Carolina.

5. The Court erred in ordering Defendant confined for a period of one year, the error being that the said Order does not conform to the sentence issued at trial.

6. The Court erred in sentencing Defendant to confinement for a period in excess of that provided by law without first according Defendant all the guarantees of due process, the said sentence exceeding

confinement for a period of six months.

7. The Court erred in failing to find and conclude that Defendant's remarriage to the Plaintiff vitiated the Court's prior Restraining Orders relating to his spouse.

8. The Court erred in finding Defendant guilty of criminal contempt, the error being that there was insufficient evidence that Defendant's conduct was in willful disregard of the Court's orders beyond a reasonable doubt.

9. The Court erred in finding Defendant guilty of civil contempt, the error being that there was insufficient evidence that Defendant willfully disobeyed any Court order.

10. The Court erred in failing to provide in its Order of September

11, 1990, that Defendant could purge himself of civil contempt by restoring the title to certain property to its original status, the error being that civil contempt is designed to compel obedience rather than to punish.

11. The Court erred in finding Defendant in civil contempt in its Order of November 28, 1990, and in providing that Defendant could purge himself of the said civil contempt by restoring the titles to certain real estate to their former status, the error being that the said Order found the offensive transfers to be null and void and therefore there was nothing to restore; accordingly, Defendant was unable to purge himself of the said contempt.

12. The Court erred in failing to direct a verdict for Defendant at the close of Plaintiff's case, the error being that there was insufficient evidence as a matter of law to find Defendant in contempt and the Court should have therefore directed a verdict for Defendant.

APPENDIX H

TRANSCRIPT OF CONTEMPT HEARING
(Relevant Portion)

Q: But who were they filed by, do you know?

A: I don't know who they were filed by.

Q: Did they form a cloud on the title until they were filed?

A: In a real estate transaction, I really---I don't believe they did.

Q: The answer is no?

A: Yes, sir.

Q: So you don't know who filed them?

A: That's correct.

******

Q: But until they filed they posed no cloud over the property, did they?

A: That's correct.

Q: And you don't know whether Mr. Whetstone filed them or not?

A: I have no personal knowledge of who filed these documents.

Q: You don't know who filed them?

A: That's correct.

******

Q: Now, to file these deeds did anyone have to buy doc stamps?

A: Yes, they did.

Q: Have you made any inquiry or determination who paid for those doc stamps?

A: I have not.

Q: Or any of these documents?

A: I have not.

Q: Is there any question in your mind that an Order by this Court today would remove that cloud?

A: There's a question in my mind that---

Q: That if Judge Campbell issued an Order voiding or negating all these transactions, that it would remove the cloud and make these properties immediately marketable?

A: Yes, it would. Yes.

******

MR. HARPOOTLIAN: Your Honor, I would at this point prior to make a decision to go forward with the evidence, I would ask you to, in effect, to deny the request. I don't believe they've met their burden to show that it was an intentional act of contempt on the part of Mr. Whetstone. Rather than requiring him to go forward with any proof at this point, I would ask Your Honor to deny that aspect of their Petition. We have no objection to granting the second part of the Petition which is to issue an Order negating any and all of these transactions.

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MR. HARPOOTLIAN: I would notice when Mr. Barber mentioned your Order of December of 1989, in which you suspended contempt, the sentence against Mr. Whetstone, I would

note for the record that all of the conduct contained in these documents occurred prior to December of 1989, except for filing. There is no evidence before Your Honor which would indicate that Mr. Whetstone caused or filed anything, so there's nothing that occurred since December of 1989, since you issued this Court's Order, which would indicate Mr. Whetstone filed anything, that he filed anything with the Clerk of Court. And the Receiver indicates he doesn't even know who bought the doc stamps, and certainly doc stamps were bought to put on these deeds, and someone came to the Clerk's office and filed them. So at this point, Your Honor, we'd ask you to grant our motion.

******

THE COURT: Your motion is denied, Mr. Harpootlian.